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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 586

WERNER REIMANN,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

No. 587

CITIZENS PROTECTIVE LEAGUE, ET AL.,

Petitioners,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

No. 588

CITIZENS PROTECTIVE LEAGUE, ET AL.,

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vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WITH BRIEF IN SUPPORT THEREOF.

JAMES J. LAUGHLIN,
Counsel for Petitioners.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WITH BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

The petitioners, Werner Reimann and the Citizens Protective League, et al, respectfully petition this Court

to grant writs of certiorari to the United States Court of Appeals for the District of Columbia to remove therefrom for review here the record in Cases No. 9194, 9193 and 9195, wherein petitioners are appellants and the respondent is appellee, and in which cases the Court announced its opinion under date of May 2, 1946, affirming the judgment of the District Court of the United States for the District of Columbia.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1925.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia entered on May 2, 1946.

Petition for rehearing was denied on May 27, 1946. The time within which petition for certiorari may be filed in this Court has been extended to October 7, 1946.

Summary Statement of Matter Involved

Three civil actions were brought in the District Court of the United States for the District of Columbia for mandatory injunction and ancillary relief. It was alleged that certain German Nationals were threatened with deportation as alien enemies. The respondent is the Attorney General of the United States. Injunction had been asked upon the ground that the Alien Enemy Act is repugnant to the Constitution. There was application made for designation of a three judge Court, by virtue of the Act of August 24, 1937. 28 U. S. C. A. 380a. The complaint alleged that the Alien Enemy Act of 1798, 1 Stat. 577, as amended, 8 U. S. C. A. 21, is unconstitutional. It is alleged that the Act of 1798 in any event had been

repealed at least by implication, and there is no legal basis for the attempted deportations inasmuch as the United States is not now at war with Germany; that the German Nationals had been guilty of no offenses against the United States subjecting them to deportation. It was alleged also that the Board appointed by the Attorney General to conduct hearings is biased and partial, and that it would be futile for petitioners to appear before the Board. The complaint alleged that nine of the parties were naturalized citizens of the United States and their citizenship was wrongfully revoked. The single appellant in No. 9194 alleges that his naturalization as a citizen of the United States was scheduled for December, 1942, but was not granted due to false statements made by his divorced wife; that the administrative hearing granted him in the deportation proceedings did not comply with due process of law and that the order of deportation is unconstitutional, illegal, contrary to existing law and did work irreparable injury.

We believe it will be conceded that all of the German Nationals are threatened with removal to Germany by virtue of the Presidential Order of July 14, 1945, unless this Court intervenes.

Questions Presented

The Alien Enemy Act of 1798 is unconstitutional. The District Court was in error in refusing to designate a three judge court when the issue of unconstitutionality was raised. The Executive was without power to promulgate the order for the removal. While there has been no executive or legislative direction that the war is officially at end the emergency has ceased to exist and German nationals cannot be removed without a showing that they are otherwise removable under the present Immigration Laws.

Reasons Relied upon for Allowance of Writs of Certiorari

1. The United States Court of Appeals for the District of Columbia has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court of the United States for the District of Columbia as to call for this Court's power of supervision.

2. There are serious constitutional questions involved in this petition which should be passed upon by this Court. The right of the Government of the United States to remove aliens from our land and to permit them to be sent perhaps to the slave labor camps in the Russian zone of occupation in Germany is revolting to our sense of justice. This Court should determine the question as to whether the war is now at an end and whether the proclamation by the President of the United States is now binding.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued by this Court directed to the United States Court of Appeals for the District of Columbia commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket as No. 9194, Werner Reimann, Appellant, *v.* Tom C. Clark, Attorney General of the United States, Appellee; No. 9193, Citizens Protective League, et al., Appellants, *v.* Tom C. Clark, Attorney General of the United States, Appellee; and No. 9195, Citizens Protective League, et al., Appellants, *v.* Tom C. Clark, Attorney General of the United States, Appellee, and that the judgments of the Court below be reversed by this Court and that your petitioners have such other and further relief in the premises as to this Court may seem just.

JAMES J. LAUGHLIN,
National Press Building, Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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Respondent

BRIEF IN SUPPORT OF PETITION

Opinions of the Court Below

The opinion below, announced May 2, 1946, appears in the record at pages 26-32. Rehearing was denied May 27, 1946.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by Act of February 13, 1925.

Statement of the Case

A concise statement of the case containing, as petitioners believe, all that is material to the consideration of the questions presented, is set forth in the petition and is not repeated here.

Argument

It is contended that these cases are controlled by the opinions of this Court in *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *Hartzell* v. *United States*, 322 U. S. 680; and *Bridges* v. *Wixon*, 89 Law Ed. 1489. The orders for the removal of the German Nationals were based upon the proclamation of the President, dated July 14, 1945, acting under the authority of the Alien Enemy Act of 1798. The proclamation set forth the following:

> "All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe." Record 9.

The respondent then notified the parties as follows:

> "Pursuant to the above proclamation and based upon the evidence considered at your earlier alien enemy

hearing or hearings, it has been determined that you should be removed and repatriated to the country of your nationality as soon as arrangements for your transportation can be made. You are hereby notified that prior to the issuance of a final order for your removal and repatriation you are entitled to a hearing before a hearing board appointed by the Attorney General. If you request a hearing as hereinafter prbvided, you will be accorded an opportunity to appear in person and to present evidence to show that you are not dangerous to the public peace and safety of the United States because of your adherence to an enemy government or to the principles of government thereof, or to show mitigating or extenuating circumstances in your case which you believe should constitute a valid reason why you should not be ordered repatriated."

It is our contention that unless it can be specifically shown that these parties committed acts of disloyalty against the United States while the war was in progress or have committed offenses subjecting them to deportation under existing law, that their removal is unwarranted and unjustified. True it is the country is still technically at war, but the dissenting opinion of Mr. Justice Rutledge in the case of *Application of Yamashita,* 66 Sup. Ct. Rpt. 340, at 362, has application. In that case Justice Rutledge said this:

> "We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. * * * Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed."

The record fails to show the parties litigant whose removal is sought committed any acts of disloyalty towards the United States, but their only crime seems to be that they are Nationals of Germany. We believe that there is no precedent for the action contemplated here. The words of Mr. Justice Murphy in his dissenting opinion in the case of application of Yamashita, supra, at page 359, have application. We find this:

> "At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world and which is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit."

The record discloses that there was an utter disregard of the constitutional requirement of due process of law. For instance, we find in Paragraph 11 of the complaint filed in District Court, in the case entitled Citizens Protective League, et al., *v.* Clark (Record 10), Civil Action No. 29881, the following:

> "Plaintiffs say unto the Court that by virtue of the letter written by the Assistant Attorney General provision is made for an administrative hearing and that a board has been appointed to conduct these hearings.

However, plaintiffs say unto the Court that it would be futile to appear before the said Board because the board is biased and partial and has great hostility toward all members or former members of the German-American Bund and in fact a member of the board makes the following statement preliminary to these hearings: 'If anyone has been a member of the German-American Bund or a member of the National Socialist Party in Germany he will be deported'."

Conclusion

It is contended that in the interest of justice that the orders for removal of the German Nationals involved in this suit be annulled and set aside. Wherefore, it is respectfully submitted that a writ of certiorari should issue as prayed.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 586

WERNER REIMANN, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES [1]

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the Court of Appeals for the District of Columbia (R. 26–32) is reported in 155 F. 2d 290.

JURISDICTION

The judgments of the Court of Appeals were entered on May 2, 1946 (R. 33–35). Petitions for

[1] Together with No. 587, *Citizens Protective League, et al., Petitioners* v. *Tom C. Clark, Attorney General of the United States*, and No. 588, *Citizens Protective League, et al., Petitioners* v. *Tom C. Clark, Attorney General of the United States.*

rehearing were denied on May 27, 1946 (R. 36–37). By order of the Chief Justice of the United States, dated August 21, 1946, the time within which petition for certiorari might be filed was extended to and including October 7, 1946 (R. 39). The petition for writs of certiorari was filed on October 7, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the Alien Enemy Act and Presidential Proclamation 2655, the Attorney General had the authority to issue the repatriation orders in question.

2. Whether, if so, a substantial question is raised by the contention that the Alien Enemy Act, as so applied, is unconstitutional.

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The provisions of the Alien Enemy Act of 1798, R. S. 4067–4070, as amended, 40 Stat. 531, 50 U. S. C. 21–24, are set out in Appendix A, *infra,* pp. 19–21. The text of the President's Proclamation 2655 (10 F. R. 8947) and of the Attorney General's regulations issued pursuant thereto (10 F. R. 12189) are set out in Appendix B, *infra,* pp. 22–26.

STATEMENT

1. THE FACTS OF RECORD

No. 586.—Petitioner Reimann brought this suit against the Attorney General seeking a preliminary and permanent injunction restraining the respondent from deporting or attempting to deport the petitioner and, in addition, requesting a declaratory judgment adjudging the petitioner to be a citizen of the United States. In his complaint, Reimann alleged that he was in imminent danger of deportation to Germany, that the threatened deportation was unlawful, that he had never engaged in any un-American activities and that while he was eligible for naturalization as a citizen, he had been unable to secure his final papers because he was confined at Ellis Island as an enemy alien (R. 1–3). A motion to dismiss was filed by the respondent in which it was stated that no facts were alleged establishing that the Attorney General was without authority to order the petitioner to depart from the United States, that there was no allegation that the Attorney General had ordered his removal from the United States, and no pleading of facts which established that his removal was imminent or imminently threatened, and that the petitioner had failed to exhaust his administrative remedy (R. 5). The district court granted this motion and ordered that the action "be dismissed on the merits" (R. 6).

No. 587.—This suit was brought by the Citizens' Protective League and sixteen individual plaintiffs (R. 7). The Citizens' Protective League is described in the complaint as a "non-profit organization to insure equal rights for all and to safeguard the constitutional rights of all persons" (R. 7). The complaint alleged that nine of the plaintiffs had been citizens of the United States but that their citizenship had been revoked (R. 8). It was further alleged that, on July 17, 1945, Herbert Wechsler, Assistant Attorney General, promulgated a form letter entitled "Notice of Determination of Repatriation of Alien Enemy", which set forth a part of Presidential Proclamation 2655, Appendix, *infra*, pp. 22–24. (R. 8–9), and that unless the court granted injunctive relief, petitioners would be apprehended and deported to Germany and that such action would be unlawful (R. 9). It was stated in the complaint that provision had been made for an administrative hearing, that a board had been appointed to conduct these hearings, but that it would be futile for the petitioners to appear before the board because the board was biased and partial and that one member of the board had said that "if anyone has been a member of the German-American Bund or a member of the National Socialist Party in Germany will be deported [*sic*]" (R. 10). In addition, it was stated that since the Act of 1798 was unconstitutional, there was no legal foundation for

appointing a hearing board and no requirement that the petitioners submit themselves to hearing before that board (R. 10). Finally, petitioners prayed for a temporary and permanent injunction restraining the Attorney General from deporting or attempting to deport them and for a mandatory injunction to restore to the petitioners the citizenship wrongfully taken from them (R. 10–11). Respondent filed a motion to dismiss in which he alleged that the Attorney General has no power to restore citizenship to a person when citizenship has been cancelled by the decree of a court of competent jurisdiction, that there had been a complete failure to allege facts establishing that the Attorney General was without authority to order the petitioner to depart from the United States, that the Citizens' Protective League and its chairman had failed to allege any injury to themselves or any interest in the subject matter, that there had been no allegation that the Attorney General had ordered the removal of any of the petitioners from the United States or that their removal was imminently threatened, and that the petitioners had failed to exhaust their administrative remedy (R. 11).

Application for the designation of a three-judge statutory court was made on the ground that the constitutionality of the Alien Enemy Act was challenged, but that application was denied with the notation "no substantial federal ques-

tion raised" (R. 12). Subsequently, an order was entered granting the motion to dismiss and decreeing that the action should "be dismissed on the merits" (R. 12–13).

No. 588.—The Citizens' Protective League, and 144 individual petitioners, brought this suit for a temporary and permanent injunction restraining the respondent from deporting or attempting to deport the petitioners. They alleged that they were confined on the ground that they had adhered to the Nazi Government and its principles, that they were threatened with deportation to Germany, in that on July 17, 1945 a "Notice of Determination of Repatriation of Alien Enemy" had been issued in which it was stated, *inter alia*, that it had been determined that "you should be removed and repatriated to the country of your nationality", that "prior to the issuance of a final order for your removal and repatriation you are entitled to a hearing," that the hearing could be obtained by executing an attached form, and that if no request was made before July 26, 1945 a final order for removal would be entered (R. 15–16). The petitioners stated in their complaint that there was no authority in the law for their deportation, that they had committed no act of disloyalty, that there had been no evidence to show that they had done anything to the detriment of the peace and security of the United States, and that if they were deported it would

work irrevocable hardship on their families and themselves (R. 16–17). The respondent filed a motion for summary judgment, pointing out that the petitioners admitted that they were alien enemies, that as to the petitioners other than Riemschneider and Stade, the action was prematurely brought in that no order of removal had been issued against the petitioners; that a number of petitioners had requested hearings which had not been held, that the Citizens' Protective League failed to allege any injury whatever, that four of the petitioners were not subject to the jurisdiction of the Attorney General, that five of them had been paroled and that no further action looking toward their removal was contemplated, and that as to the petitioner Riemschneider and Stade, there were no questions of fact for determination by the court (R. 18–19). Attached to this motion was an affidavit of the Attorney General in support, specifically stating, *inter alia,* that four of the petitioners were alien enemies who were sent to this Country from other American Republics and that they were subject to the jurisdiction not of the Attorney General but of the Secretary of State (R. 20–21). Attached also were the orders of repatriation issued against Riemschneider and Stade (R. 21–23). In addition, a supplemental affidavit of the Acting Head of the War Division of the Department of Justice was filed in which it was stated that since the

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filing of the affidavit of the Attorney General, four of the petitioners had been released from the custody of the respondent and that another, previously described as having been paroled, had in fact been wholly released and discharged from custody (R. 23–24). The district court granted the motion for summary judgment and decreed that the action should be "dismissed on the merits" (R. 24).

Appeals in all cases were taken to the Court of Appeals for the District of Columbia, which, on May 2, 1946, affirmed the judgments (R. 33–35), holding that the constitutional question raised by the petitioners was not substantial (R. 30). On May 27, 1946, petitions for rehearing were denied and petitions to restrain the respondent *pendente lite* from deporting the petitioners were denied "in view of our determination that these appeals are without merit" (R. 36–37).

2. ADDITIONAL FACTS

When issue was joined in this case, repatriation orders had been issued against only petitioners Riemschneider and Stade (R. 21–23). Since that time, however, the cases of all the petitioners except the Citizens' Protective League, and August Wellman, petitioner in No. 588 (R. 14), have been acted upon, either by way of order of removal or release. It is plain that the League, not being subject to removal, has no standing in this case, and we will not concern

ourselves further with it. No argument is required to sustain the proposition that the petition for certiorari, as to it at least, should be denied. Wellman's case is somewhat more difficult. His action seems plainly premature, but it is not clear from the record that the district court dismissed it on that ground (R. 24). The dismissal "on the merits" may be thought to be a bar to a second action by Wellman, and the Government is not, therefore, disposed to urge denial of the petition in his case on that ground.

In Appendix C, *infra,* pp. 27–31, we have listed the remaining petitioners and noted the disposition of their cases. Four—Buerger, Kuny, Reinbold, and Schwarz, were subject to the jurisdiction of the Secretary of State and not of the Attorney General (R. 19, 21) and their petition might well be denied on that ground. Moreover, the cases of three of these four appear to be moot. See Appendix C, *infra,* p. 27. In addition, the cases of those petitioners who have been released would appear to be moot. See Appendix C, *infra,* pp. 29–31. And the cases of Oswald Pursche and George John Einzinger would seem to be moot since they have already been repatriated voluntarily. See Appendix C, *infra,* p. 28.

The subsequent removal orders against the other petitioners (Appendix C, *infra,* pp. 27–29) pose a different question. It has been held that an appeal, even in equity, must be determined upon the facts as they appeared to the trial court.

Russell v. *Southard*, 12 How. 139, 158–159. But this Court has made exceptions in the application of this rule. *Bowles* v. *United States*, 319 U. S. 33; cf. *Walling* v. *Reuter Co.*, 321 U. S. 671. The Government can conceive of no prejudice to it if the cases of the petitioners ordered removed after issue was joined are now treated together with the cases of Riemschneider and Stade and disposed of on the same considerations. Apparently, the petitioners would have no objection to this procedure. If the petition is to be denied in any event, however, there will be no occasion for the Court to consider its power in this respect.

ARGUMENT

The issues of the scope and validity of the Alien Enemy Act are important ones. Whether some 700 alien enemies are to be repatriated or to remain in this country depends largely on their resolution.[2] But because we think that the questions presented have long since been answered adversely to the petitioners' contentions, and that litigation under this repatriation program will not be sooner terminated by an affirmance on the merits than by a denial of certiorari, we are constrained to oppose the issuance of the writs here sought.

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[2] The precise figure is 736. Of this number, 305 are German nationals, and 431 are Japanese. 388 of the Japanese are persons who renounced their American citizenship.

Section 21 of the Alien Enemy Act,[3] empowers the President "to provide for the removal" of "natives, citizens, denizens, or subjects" of a hostile nation or government whenever "there is a declared war between the United States and any foreign nation or government * * *". See Appendix A, *infra,* pp. 19–20. Pursuant to that statutory authority, the President, on July 14, 1945, issued his Proclamation 2655, in which he directed that all alien enemies, interned within the United States, who "shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States". See Appendix B, *infra,* pp. 22–24. It is clear that the petitioners against whom orders of repatriation have been issued fall within the terms of the statute and the Presidential Proclamation.

There is no dispute but that the petitioners here involved are alien enemies. While some of them contended that they were improperly denaturalized or refused naturalization, that point does not seem to be raised in the petition for writs of certiorari. Moreover, the lower courts were plainly correct in refusing to review collaterally

[3] For convenience, the sections of the Alien Enemy Act are, throughout this brief, numbered as they are in Title 50 of the United States Code.

the denaturalization judgments of courts of competent jurisdiction, and in refusing to direct the Attorney General, who has no such power, to naturalize those who have been denied citizenship. The orders of repatriation which appear in the record in this case contain the findings of dangerousness required by the Presidential Proclamation (see R. 21–23), and they are typical of the orders of repatriation which have been issued with reference to the other petitioners.

Petitioners' primary contention seems to be that the power to issue orders of repatriation has been terminated with the end of widespread combat conditions (Pet. 3, 4). However, this Court has consistently held that a federal statute, the applicability of which is limited, by one form of words or another, to a state of war, does not cease to be operative until the state of war has been terminated either by treaty, Act of Congress, or Executive Proclamation. *United States* v. *Anderson,* 9 Wall. 56, 69–71; *The Protector,* 12 Wall. 700; *McElrath* v. *United States,* 102 U. S. 426, 438; *Kahn* v. *Anderson,* 255 U. S. 1, 9–10; cf. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 158–161. See Mathews, *Termination of War* (1921), 19 Mich. L. Rev. 819, 820. See also, *In re Yamashita,* 327 U. S. 1, 11–12, and *J. Ribas y Hijo* v. *United States,* 194 U. S. 315, 323.

The language of the Alien Enemy Act is clear and its history contains nothing to indicate that

it was not intended to continue in effect throughout the existence of a "declared war". Cases arising during the first World War which were heard and decided after the Armistice are equally bare of any intimation that the termination of actual combat conditions was thought to be of significance in this connection. See *Ex Parte Risse,* 257 Fed. 102 (S. D. N. Y.); *Ex Parte Gilroy,* 257 Fed. 110 (S. D. N. Y.); *Banning* v. *Penrose,* 255 Fed. 159 (N. D. Ga.). Moreover, Congress, in the Act of May 10, 1920, passed almost two years after the Armistice with Germany, recognized the continued effectiveness of the Alien Enemy Act by providing for the deportation, *inter alia,* of aliens then "interned under [Section 21 of the Alien Enemy Act] and the proclamations issued by the President in pursuance of said section", 41 Stat. 593.[4]

2. It remains to be considered whether a substantial question as to the constitutionality of the Alien Enemy Act as applied in these cases is presented.[5] The Act came into being as a war-time measure and is intended to control alien enemies in time of war or threatened war only.

[4] It should be noted that the Act permits of no differentiation between the power to intern and the power to remove.

[5] Both courts below held that the constitutional attack made upon the Act did not raise a substantial question (R. 12, 30). On that premise, a three-judge district court was correctly denied, and the appeal was properly heard in the Court of Appeals. *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171.

Its validity must be measured by the war powers conferred by the Constitution. See *Hirabayashi* v. *United States,* 320 U. S. 81, 93, and cases cited. From the earliest days of the Republic, a summary power over enemy aliens has been recognized. In his report on the Virginia Resolutions, Madison took care to distinguish between the Alien Enemy Act and the alien and sedition laws, pointing out that (4 Elliot's Deb. 554):

> Much confusion and fallacy have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation; and aliens, members of friendly nations.* These two cases are so obviously and so essentially distinct, that it occasions no little surprise that the distinction should have been disregarded; and the surprise is so much the greater, as it appears that the two cases are actually distinguished by two separate acts of Congress, passed at the same session, and comprised in the same publication; the one providing for the case of "alien enemies;" the other "concerning aliens" indiscriminately and consequently extending to aliens of every nation in peace and amity with the United States. With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.

See also, Gallatin, speaking against the alien and sedition laws, Annals of Congress, 5th Cong., 2d sess., pp. 1980–1983.

Four different Justices of this Court, in individual opinions or on circuit, have expressly or impliedly upheld the removal provisions of the Alien Enemy Act. See Mr. Justice Washington in *Lockington* v. *Smith,* 15 Fed. Cas. No. 8448; Mr. Justice Iredell in *The Case of Fries,* 9 Fed. Cas. No. 5126 at p. 831; Mr. Justice Story, dissenting in *Brown* v. *United States,* 8 Cranch 110, 153, and Chief Justice Marshall in an unreported case referred to in *Lockington's Case,* Brightley (Pa.) 269, 283, 296. See also Chief Justice Marshall in *Brown* v. *United States,* 8 Cranch 110, 122–123; Kent, C. J., in *Clarke* v. *Morey,* 10 Johns. (N. Y.) 69, 71, and the opinion of Attorney General Caleb Cushing, August 31, 1855, 7 Op. Att'y Gen. 453, 454. There has been no dissent from this view.

The constitutionality of the Act has, moreover, been either explicitly upheld or assumed by all the lower federal courts which have had occasion to deal with it. *DeLacey* v. *United States,* 249 Fed. 625, 626 (C. C. A. 9); *Banning* v. *Penrose,* 255 Fed. 159 (N. D. Ga.); *United States ex rel. Schwarzkopf* v. *Uhl,* 137 F. 2d 898, 900 (C. C. A. 2); *United States ex rel. DeCicco* v. *Longo,* 46 F. Supp. 170 (D. Conn.); *United States ex rel. Zdunic* v. *Uhl,* 46 F. Supp. 688 (S. D. N. Y.), re-

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versed on another ground, 137 F. 2d 858 (C. C. A. 2); *Ex Parte Gilroy*, 257 Fed. 110 (S. D. N. Y.); *Ex Parte Risse*, 257 Fed. 102 (S. D. N. Y.); *Minotto* v. *Bradley*, 252 Fed. 600 (N. D. Ill.); *Ex Parte Fronklin*, 253 Fed. 984 (N. D. Miss.); *Ex Parte Graber*, 247 Fed. 882 (N. D. Ala.) And it is clear that, before the official end of the war, the termination of widespread combat conditions raises no constitutional obstacle to the enforcement of a war-time statute. *Stewart* v. *Kahn*, 11 Wall. 493, 507; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 163.

This Court has, of course, upheld acts providing for the deportation of friendly aliens. See, *e. g.*, *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425, and cases cited. There would seem to be no doubt then as to the right to remove alien enemies, for that right rests not only on the ordinary power of a sovereign to deport aliens, but also on the war powers of the Federal Government.

3. Petitioners' assertion that the cases of *Schneiderman* v. *United States*, 320 U. S. 118, *Baumgartner* v. *United States*, 322 U. S. 665, *Hartzel* v. *United States*, 322 U. S. 680, and *Bridges* v. *Wixon*, 326 U. S. 135, are controlling (Pet. 6), is in error. The *Schneiderman* and *Baumgartner* cases involved the quantum of proof necessary on a denaturalization proceeding. The

Hartzel case dealt with the propriety of a criminal conviction under the Espionage Act, and *Bridges* v. *Wixon* concerned the deportation, pursuant to statute and rules not relevant here, of a friendly alien. It is clear that none has any relevance to the scope of the war power over alien enemies.

Petitioners' further contention that they were not accorded due process (Pet. 8–9) is utterly without merit. Apart from general and unsustained allegations of bias and prejudice on the part of the hearing board, only one specific charge is made (Pet. 9). It is contended that one member of the board stated that any member of the Bund or the National Socialist Party would be deported (R. 10). It suffices to say that the removal orders were issued by the Attorney General and not the board, that they were issued only after a *de novo* examination of all available evidence by the Attorney General, and that, in any event, hearing officers "are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption." *United States* v. *Morgan,* 313 U. S. 409, 421.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition for writs of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
THOMAS M. COOLEY II,
Attorney, Department of Justice.

NOVEMBER 1946.

APPENDIX A

The Alien Enemy Act of 1798 provides that:[1]

> SEC. 21. Restraint, regulation and removal.
>
> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any

[1] The section numbers used are those found in title 50 of the United States Code.

other regulations which are found necessary in the premises and for the public safety (R. S. § 4067 as amended by the Act of Apr. 16, 1918, ch. 55, 40 Stat. 531).

Sec. 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

Sec. 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, and several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or

justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien until the order which may be so made shall be performed (R. S. § 4069).

Sec. 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Presidential Proclamation 2655 (10 F. R. 8947) reads as follows:

REMOVAL OF ALIEN ENEMIES BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

WHEREAS section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect

to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

WHEREAS sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

WHEREAS the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

WHEREAS by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

WHEREAS I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid

proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN.

By the President:
JAMES F. BYRNES,
Secretary of State.

The regulations of the Attorney General (10 F. R. 12189), pursuant to Presidential Proclamation 2655, are as follows:

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM U. S.

Sec.
30.71 Removal from the United States of alien enemies.

30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U. S. C. 21.

§ 30.71 *Removal from the United States of alien enemies.* The Proclamation of the President of the United States, No. 2655 (10 F. R. 8947), dated July 14, 1945, provides in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.* When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner

of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.73 *Service of removal order on alien enemy.* A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.* An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.* In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

APPENDIX C

Petitioners subject to the jurisdiction of the Secretary of State

Name:	*Disposition*
Buerger, Georg	Departed by plane for Costa Rica on May 3, 1946, with family.
Kuny, Rudolf	En route to San Antonio, February 1, 1946, to arrange transportation for return to El Salvador.
Reinbold, Georg J. B	State Department removal order, July 9, 1946.
Schwarz, Erich	Left by plane for Ecuador on April 26, 1946.

Petitioners ordered removed

Name:	*Date of Order*
Reimann, Werner	March 6, 1946.
Borchers, Walter	February 28, 1946.
Fentzke, Otto	February 28, 1946.
Kunz, William Carl	January 18, 1946.
Knupfer, Bruno Clemens	February 28, 1946.
Rapp, Max	January 11, 1946.
Christoph, Ernst Martin	January 11, 1946.
Fitting, John	January 15, 1946.
Schwinn, Herman Max	March 27, 1946.
Klapprott, August	March 27, 1946.
Willumeit, Otto	May 23, 1946.
Bante, Paul	January 12, 1946.
Beuchert, Adolf	January 9, 1946.
Boeck, Fred Karl Herman	January 11, 1946.
Boehm, Karl F	April 4, 1946.
Bott, Rudolf F	January 11, 1946.
Brueckner, Albert K. E	January 11, 1946.
Dittman, Heinrich	October 16, 1945.
Doberstein, Heinz W	January 12, 1946. Subject a fugitive. Did not surrender at expiration of 30-day parole granted him May 22, 1946.

Einzinger, George John	January 17, 1946. Repatriated to Germany January 24, 1946.
Ehmann, Christian	August 26, 1946.
Fanger, Gottfried	January 11, 1946.
Geisler, Hans	January 12, 1946. Petitioning for rehearing on denaturalization.
Grabbe, Otto F	January 15, 1946.
Grimm, Otto	January 12, 1946.
Guenzel, Paul H	January 15, 1946.
Hack, Wilhelm	February 27, 1946.
Hartmann, Robert	January 15, 1946.
Hoehn, Hermann	January 12, 1946.
John, Heinz P	January 15, 1946.
Jung, Johann L	January 12, 1946.
Junghlaus, Conrad George	January 12, 1946.
Kuehn, Arthur	January 14, 1946.
Kuehn, Joseph	March 6, 1946.
Lamee, Chris	January 18, 1946.
Maier, Joseph	March 28, 1946.
Mank, Wilhelm	January 11, 1946.
Nurnberger, Carl	January 14, 1946.
Olden, John (Aldin)	January 14, 1946.
Orths, Willy J	January 18, 1946.
Poehner, John H	January 11, 1946.
Pursche, Oswald	December 14, 1945. Repatriated on December 22, 1945.
Reese, Hartwig	January 12, 1946.
Schaumann, William T. C	January 15, 1946.
Schelkshorn, Karl Franz	January 9, 1946.
Schmidt, Hans Juergen	January 11, 1946.
Schrader, Franz W. L	January 8, 1946.
Schweitzer, Karl	January 14, 1946.
Schweitzer, Kurt Adam	January 14, 1946.
Schwenck, Ernst	January 14, 1946.
Sprenger, Gerhard E	January 15, 1946.
Stauss, Gustav	January 9, 1946.
Stoll, Johann	January 18, 1946.
Von Proeck, Konrad Theodor	January 15, 1946.
Voss, Dirk	March 20, 1946.
Wagner, Otto	January 14, 1946.
Benzenhofer, Paul	December 28, 1945.
Bertelmann, Margaretta J	January 12, 1946.
Bremer, Otto	January 18, 1946.
Braunger, Otto	January 25, 1946.
Espenchied, Otto	January 22, 1946.
Fitterer, Linus	January 18, 1946.

Grytzyk, George R	January 18, 1946.
Hofling, William Werner	January 18, 1946.
Haupt, Erna	February 25, 1946.
Leighton, Greta	December 28, 1945.
Maier, Rose	January 18, 1946.
Neubacher, Gertrude	December 28, 1945.
Neubacher, Otto	December 28, 1945.
Ogger, Arthur Irwin	January 11, 1946.
Ortner, Martin	January 18, 1946.
Rapp, Rosine	January 11, 1946.
Reese, Henry	January 18, 1946.
Reimschneider, Georg	October 9, 1945.
Schluckwerder, Martin Kurt	January 18, 1946.
Stade, Heinz	October 9, 1945.
Stohr, Meta	June 27, 1946.
Uhlig, Antonie	January 18, 1946.
Volkheimer, Gregor	January 18, 1946.
Stabler, Oscar Richard	April 4, 1946.
Arens, Alrich	January 11, 1946.
Backofen, Willy Georg	January 11, 1946.
Greis, Peter Joseph	January 16, 1946.
Kohler, Maria Theresia	January 15, 1946.
Kohler, Matthias	January 15, 1946.
Koop, Bruno, P. J., Sr	January 14, 1946.
Koop, Bruno O. P	January 14, 1946.
Neupert, George	January 14, 1946.
Roehm, Herman C	January 14, 1946.
Diebel, Hans Carl	April 3, 1946.

Petitioners released

Name:	*Date of order or other disposition*
Elmer, Gustav Joseph	October 30, 1946. Subject to be transferred to City Institution—mental case.
Schatz, Louis	September 24, 1946.
Agne, Herman	May 9, 1946.
Schneller, Walter	January 31, 1946.
Streuer, Fritz Karl	December 19, 1945. Case closed, and citizenship restored to subject on December 13, 1945.
Auras, Richard	August 23, 1946.
Berg, Paul	October 1, 1946.
Brehl, Albrecht A	October 23, 1945.
Dralle, Wilhelm H	February 21, 1946.
Eurich, Alfred	March 12, 1946.
Fischer, Gustav L	July 18, 1946.
Herter, Werner H	December 28, 1945.

John, Werner	January 15, 1946.
Kalb, Arthur K. M	October 23, 1945.
Kemp, Martin J	Case closed February 26, 1946. Subject transferred to Immigration & Naturalization Service for deportation proceedings.
Kratz, Xaver	October 6, 1945.
Krohn, Hans August Wilhelm	January 8, 1946.
Lange, Albert	December 3, 1945.
Lauck, William Frederich	August 23, 1946.
Manz, Erich Arthur	February 22, 1946.
Mueller, Adolf Gustav	January 18, 1946.
Muller, Heinrich	January 25, 1946.
Olbrich, Frank	October 3, 1945.
Ortwein, Herman	July 22, 1946.
Pels, Alois	December 3, 1945.
Richter, Karl O	January 11, 1946.
Schliephake, Richard Ludwig	January 25, 1946.
Schmidt, Bruno Carl Robert	July 18, 1946.
Schramm, Kurt R	December 3, 1945.
Schweikert, Alwin	Paroled October 23, 1945. General release on November 15, 1945.
Schultz, John C	December 3, 1945.
Stenzel, August Carl	February 21, 1946.
Steuer, Hans Emil	May 29, 1946.
Weist, Konrad	January 18, 1946.
Well, Albert Simon	October 23, 1945.
Wempe, Clemens	December 3, 1945.
Wilmes, Joseph	February 21, 1946.
Eck, Wilhelm	June 28, 1946.
Fikis, Ferdinand S	October 9, 1946.
Flechsel, Anna	July 18, 1946.
Froboese, Luise Anna	Paroled October 2, 1945. General release on November 15, 1945.
Goerig, Emilie	May 29, 1946.
Hamisch, Hildegarde M. L	July 18, 1946.
Hofman, Simon Peter	Paroled October 27, 1945. General release on November 15, 1945.
Horstmann, August	October 1, 1946.
Kubiak, Waldermar	March 28, 1946.
Schaefer, Madeliene	December 19, 1945.
Schnellinger, Willy J	March 25, 1946.
Schwarz, Rudolf	May 27, 1946.
Voight, Hildegard	July 18, 1946.

Volkmann, William	Paroled October 2, 1945. General release on November 15, 1945.
Wilking, Kurt	October 25, 1946.
Einsidel, Eugene Jacob Heinrich	December 3, 1945.
Einseidel, Frieda Kuebler Ann	December 3, 1945.
Koop, Helene M	December 3, 1945.
Krause, Albert W	August 23, 1946.
Neupert, Emma	December 3, 1945.
Pieper, Kurt J	October 3, 1946.
Roehm, Hildegard	Voluntary internee released on June 26, 1946.
Roth, Josephine	January 9, 1946.
Roth, Wilhelm	January 9, 1946.
Schneller, Franz	May 21, 1946.

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